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No. 98-1648

In the

Supreme Court of the United States

GUY MITCHELL, *et al.*,
Petitioners,

v.

MARY L. HELMS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED FOR REVIEW

Whether a program under Chapter 2 of Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 7301, *et seq.*, which provides federal funds to state and local education agencies to purchase and lend neutral, secular, and nonreligious materials such as computers, software, and library books to public and nonpublic schools for use by the students attending those schools, and which allocates the funds on an equal per-student basis, regardless of the religious or secular character of the schools the students choose to attend, violates the Establishment Clause of the First Amendment.

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation respectfully submits this brief amicus curiae in support of Petitioners Guy Mitchell, *et. al.*[1] Consent to the filing of this brief has been granted by counsel for all parties. Copies of the general letters of consent have been lodged with the Clerk of the Court.

Pacific Legal Foundation is submitting this brief because it believes its public policy perspective and litigation experience in the area of the First Amendment to the United States Constitution will provide an additional viewpoint with respect to the issues presented. Pacific Legal Foundation has participated in numerous cases before this Court, including *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), and *Agostini v. Felton*, 521 U.S. 203 (1997). Specifically, Pacific Legal Foundation will advocate the overturning of *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Meek v. Pittenger*, 421 U.S. 349 (1975); and *Wolman v. Walter*, 433 U.S. 229 (1977), and urge this Court to clarify that *Agostini* sets forth the Establishment Clause analysis applicable to aid-to-education programs. Pacific Legal Foundation believes that this case provides the Court with an opportunity to reintroduce a degree of consistency to Establishment Clause jurisprudence and declare that so long as government remains neutral in its dealings with religion, the Establishment Clause is not offended.

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[1] Pursuant to Supreme Court Rule 37.6, Amicus Curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and, furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

STATEMENT OF THE CASE

This case involves an Establishment Clause challenge to Chapter 2 of Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 7301, *et seq.*, as applied in Jefferson Parish, Louisiana. Chapter 2 provides financial assistance to local education agencies for education improvement programs for children enrolled in both "public and private, nonprofit schools." 20 U.S.C. § 7312. Chapter 2 authorizes the agencies to purchase instructional equipment, instructional materials, and library materials and loan those materials to public and private elementary and secondary schools, including religious schools, as part of a program that neutrally benefits all students in public and private schools. Any benefit provided to children in private schools, however, must be secular, neutral, and nonideological and must not take the place of any services, equipment, or materials that the private school would offer or obtain in the absence of federal funds. 20 U.S.C. § 7371(b), 7372(a)(1). Chapter 2 also requires that the control of all federal funds

> and title to materials, equipment, and property . . . shall be in a public agency . . . and a public agency shall administer such funds and property.

20 U.S.C. § 7372(c)(1).

Taxpayers sued the federal, state, and local education authorities responsible for administering the challenged program, claiming that this special education program, as applied in Jefferson Parish, violated the Establishment Clause. The Fifth Circuit Court of Appeals was of the view that, no matter how carefully the program is designed and delivered, loaning textbooks for the use of students in parochial schools was constitutionally permissible; however, the loaning of library books, computers, and computer software was constitutionally forbidden. The court found that this Court has not abandoned, nor even fundamentally changed, the *Lemon* test used to evaluate whether government aid violates the Establishment

Clause. The court held that providing instructional equipment and materials to religious schools is controlled by this Court's decisions in *Meek v. Pittenger* and *Wolman v. Walter*, which invalidated state programs that provided instructional equipment and materials to religious schools. According to the lower court, these decisions draw a categorical line between state programs lending textbooks for the use of students in parochial schools, which the court concluded are constitutionally permissible, and "programs lending instructional materials other than textbooks to parochial schools and schoolchildren," which are constitutionally forbidden. *Helms v. Picard*, 151 F.3d 347, 372 (5th Cir. 1998).

The Fifth Circuit acknowledged that this Court's most recent relevant precedent, *Agostini v. Felton*,

> discard[ed] a premise on which *Meek* relied--i.e., that "[s]ubstantial aid to the educational function of [sectarian] schools . . . *necessarily* results in aid to the sectarian school enterprise as a whole."

151 F.3d at 373 (quoting *Meek*, 421 U.S. at 366). Nonetheless, the lower court concluded that *Meek* and *Wolman* had not been called into question by *Agostini*. Further, the Fifth Circuit limited *Agostini* to the specific facts of that case.

> *Agostini* holds only that the aid at issue there (i.e., the on-premises provision of special education services by state-paid teachers) was not the kind of governmental aid that impermissibly advanced religion.

151 F.3d at 374. "*Agostini* says nothing about the loan of instructional materials to parochial schools." *Id.*

The Fifth Circuit distinguished the Ninth Circuit Court of Appeals decision in *Walker v. San Francisco Unified School*

District, 46 F.3d 1449 (9th Cir. 1995). In *Walker*, the Ninth Circuit upheld a "virtually indistinguishable" Chapter 2 program under which instructional equipment, including computers, was lent to religious schools. *See Helms*, 151 F.3d at 369. The Ninth Circuit emphasized that the instructional equipment and materials were secular, that Chapter 2 benefits were made available to all students on a neutral basis and without reference to religion, that there were monitoring controls in effect, and that no Chapter 2 money is ever paid directly to religious schools. *Walker*, 46 F.3d at 1454, 1464. The Ninth Circuit, applying the *Lemon* test, held that the program is permissible under the Establishment Clause. *Id.* at 1469.

On June 14, 1999, this Court granted the writ of certiorari in this case.

SUMMARY OF ARGUMENT

This Court granted the petition for writ of certiorari in this case, in part, to determine whether the decisions in *Meek v. Pittenger* and *Wolman v. Walter* were erroneous and should be overruled. *Meek* and *Wolman* are the unfortunate by-products of an earlier decision of this Court--*Lemon v. Kurtzman*. In *Lemon*, this Court articulated a three-part test to evaluate possible Establishment Clause violations. *Lemon* stated that a statute must have a secular legislative purpose, its primary effect must be one that neither advances nor inhibits religion, and the statute must not foster an excessive government entanglement with religion. *Lemon*, 403 U.S. at 612-13. Applying the *Lemon* test, *Meek* and *Wolman* drew a distinction between providing textbooks and providing other instructional materials--such as maps, overhead projectors, and lab equipment--to parochial schools or their students. Textbooks were constitutionally permissible, but other instructional materials and equipment were constitutionally forbidden.

The *Lemon* test should be overruled for a number of reasons. The test has led to inconsistent, and often confusing, results that discriminate against schoolchildren attending religiously affiliated schools. The use of this test has created a bizarre judicial landscape where, for example, government is free to lend textbooks to religious schools, *Board of Education v. Allen*, 392 U.S. 236 (1968); but, it is not free to lend maps, or similar education materials to those same schools. *Meek v. Pittenger*, 421 U.S. 349. Also, it is constitutional for government to pay for bus transportation to and from parochial schools, *Everson v. Board of Education*, 330 U.S. 1 (1947); however, it is unconstitutional for the state to fund bus transportation from parochial schools to museums, or other school field trip destinations, *Wolman*, 433 U.S. 229. The confusing results caused by the *Lemon* test are more than adequately demonstrated by the facts of this case where public schoolchildren are given library books, computers, and computer software under the Chapter 2 program, but the same instructional material and equipment is barred from being provided to parochial schoolchildren. *Lemon*, *Meek*, and *Wolman* should be overruled to give full effect to Congress' goal of improving educational opportunities for all schoolchildren. Otherwise, schoolchildren attending religiously affiliated schools will be forever limited to the use of textbooks under the program, while other schoolchildren are able to use up-to-date instructional materials. Nothing in the Establishment Clause prevents children who attend religiously affiliated schools from benefiting from Chapter 2 services on an equal basis with all other schoolchildren.

Lemon also should be overruled in order to provide a uniform framework for the evaluation of claims brought under the Establishment Clause. While this Court has not formally repudiated the *Lemon* mode of analysis, recent decisions have failed to rely on the test. Instead of funneling

Establishment Clause claims through the familiar three prongs of *Lemon*, this Court has instead asked whether the government's action endorses religion, *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, coerces people into religious participation, *Lee v. Weisman*, 505 U.S. 577 (1992), or acts neutrally toward religion, *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573 (1989). Although this Court appears to have modified the *Lemon* test in *Agostini*, it did not expressly overrule *Lemon*, *Meek*, or *Wolman*, requiring lower courts to apply the *Lemon* framework only to have this Court apply a different standard of review. An inefficient and confusing two-tiered system of Establishment Clause jurisprudence has emerged. The overruling of *Lemon*, *Meek*, and *Wolman* would establish a uniform standard of constitutional review.

In recent Establishment Clause cases, this Court has explained that government programs that neutrally provide benefits to a large class of citizens do not offend the First Amendment simply because a religious institution might receive an indirect benefit. *Everson v. Board of Education*, 330 U.S. at 18; *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993). This Court should expressly declare that the neutrality test laid out in *Agostini*, and not the test announced in *Lemon*, should be used to determine whether the Constitution has been violated. Chapter 2, as it is administered by Jefferson Parish, Louisiana, provides a neutral benefit to a large group of similarly situated schoolchildren. The program neither discriminates against, nor favors, children that happen to attend parochial schools. Rather, it treats these students the same way it treats their public school counterparts. Because this program neutrally provides a benefit to all schoolchildren, it does not violate the Establishment Clause.

ARGUMENT

I

THIS COURT SHOULD OVERRULE *LEMON v. KURTZMAN*, *MEEK v. PITTENGER*, AND *WOLMAN v. WALTER*

This Court's Establishment Clause jurisprudence remains in hopeless disarray even after the decision in *Agostini v. Felton*. Although legal scholars parade the *Agostini* decision as eliminating the chaos of Establishment Clause jurisprudence,[2] the *Agostini* Court's failure to overrule *Lemon v. Kurtzman* left undisturbed a line of cases resulting in continued confusion and contradictory decisions among the lower courts that require, in many circumstances, discrimination against students attending religious schools. For the reasons that follow, this Court should explicitly overrule *Lemon*, *Meek*, and *Wolman*, and put an end

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[2] Kimberly M. Dation, *Educational Vouchers and the Religion Clause Under Agostini: Resurrection, Insurrection and a New Direction*, 49 Case W. Res. L. Rev. 747 (Summer, 1999); Robyn D. Kotzker, *Constitutional Law--Departing from the Supreme Court's Traditional Establishment Clause Analysis in the Context of Government Funding to Religious Schools--Agostini v. Felton, 521 U.S. 203 (1997)*, 71 Temp. L. Rev. 1045 (Winter, 1998); Gary Mozer, Note: *The Crumbling Wall Between Church and State: Agostini v. Felton, Aid to Parochial Schools, and the Establishment Clause in the Twenty-First Century*, 31 Conn. L. Rev. 337(Fall, 1998); Doug Roberson, *Recent Development: The Supreme Court of the United States, 1996 Term: The Supreme Court's Shifting Tolerance for Public Aid to Parochial Schools and the Implications for Educational Choice: Agostini v. Felton, 117 S. Ct. 1997 (1997)*, 21 Harv. J. L. & Pub. Pol'y 861 (Summer, 1998); Christian Chad Warpula, *Note: The Demise of Demarcation: Agostini v. Felton Unlocks the Parochial School Gate to State-Sponsored Educational Aid*, 33 Wake Forest L. Rev. 465 (Summer, 1998); Daniel P. Whitehead, *Note: Agostini v. Felton: Rectifying the Chaos of Establishment Clause Jurisprudence*, 27 Cap. U.L. Rev. 639 (1999).

to the two-tiered system of Establishment Clause jurisprudence that guides aid-to-education cases.

A. The *Lemon* Test Has Resulted in Two Distinct Constitutional Theories for School-Aid Cases

In *Lemon v. Kurtzman*, 403 U.S. 602, this Court set forth a three-part test for programs challenged as unconstitutional under the Establishment Clause. The Court held that: (1) a challenged statute or program must have a secular legislative purpose; (2) its "principal or primary effect must be one that neither advances nor inhibits religion;" and (3) it must not result in "excessive government entanglement with religion." *Id.* at 612-13. This three-pronged *Lemon* test has been the subject of strong criticism by judges, attorneys, and academicians.[3] The doctrine's harshest critics, however, have been the members of this Court.

> Our cases interpreting and applying the purpose test have made such a maze of the Establishment Clause that even the most conscientious governmental officials can only guess what motives will be held unconstitutional.

Edwards v. Aguillard, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting).

> If a constitutional theory has no basis in the history of the amendment it seeks to interpret, is difficult to apply and yields unprincipled results, I see little use in it.

Wallace v. Jaffree, 472 U.S. 38, 112 (1985) (Rehnquist, J., dissenting).

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[3] *See, e.g.*, Derrick R. Freijomil, *Has the Court Soured on Lemon? A Look into the Future of Establishment Clause Jurisprudence*, 5 Seton Hall Const. L.J. 141 (1994).

Cases decided under the three-prong *Lemon* decision are inconsistent with each other and also contradict cases decided prior to the adoption of the test. Nowhere has this inconsistency been greater than in the area of state aid to religious schools.

In 1947, this Court in *Everson v. Board of Education*, 330 U.S. 1, upheld a New Jersey statute authorizing local school districts to reimburse parents for the cost of transporting their children to and from parochial schools. *Id.* at 17. The Court recognized that general welfare programs neutrally benefiting all persons did not offend the Establishment Clause. *Id.* at 18. The Court analogized the New Jersey statute to permissible public services such as

> police and fire protection, connections for sewage disposal, public highways and sidewalks [that are]. . . indisputably marked off from the [school's] religious function.

Id. at 17-18. The Court held the statute to be a

> general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools.

Id. at 18.

In *Board of Education v. Allen*, this Court upheld the constitutionality of a New York statute that required public schools to loan textbooks free of charge to all students, including students attending parochial schools. *Allen*, 392 U.S. at 238. The *Allen* Court found that the New York statute was a part of a neutrally applied general welfare program. The statute neither advanced nor inhibited religion because the textbooks were merely lent to parochial schools as part of a general program to benefit all schoolchildren regardless of the school attended. *Id.* at 243-44.

In the 1970s, this Court moved away from applying a neutrality analysis to aid-to-education programs. In *Lemon*, the Court set out a three-pronged test for applying the proscriptions of the Establishment Clause. *Lemon* examined the constitutionality of a program loaning secular textbooks to private schools and providing salary supplements for teachers. The Court began its inquiry by confessing that

> [c]andor compels acknowledgment . . . that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law.

Lemon, 403 U.S. at 612. Relying on *Allen*, the Court found that the loan of textbooks was constitutional, while simultaneously holding that the salary supplements resulted in excessive entanglement with religion. 403 U.S at 614.

This Court's subsequent use of the *Lemon* test resulted in inconsistent and contradictory holdings. For example, in *Meek v. Pittenger*, the Court invalidated a Pennsylvania statute that authorized the lending of textbooks and other instructional materials including equipment, laboratory supplies, charts, films, and maps to parochial schools. *Meek*, 421 U.S. 349. Relying on *Allen*, the Court upheld the state provisions for lending secular textbooks directly to parochial school students because it was a general program benefiting all students alike. *Id.* at 362. However, the Court invalidated the state provision for lending parochial schools instructional materials and equipment, although this material was "secular, nonideological and neutral" in nature. *Id.* at 354-55. The Court believed that it was impossible to separate the secular educational functions from the pervasively religious nature of the parochial schools. Thus, the aid would advance religion in violation of the Establishment Clause. *Id.* at 366.

Another example is *Wolman v. Walter*, 433 U.S. 229. In *Wolman*, this Court mirrored the *Meek* decision by upholding an Ohio statutory provision allowing off-premises diagnostic

services, funds for distribution and scoring of standardized tests to religious schools, and a loan of secular textbooks to students attending religiously affiliated schools, but invalidating the loan of other instructional materials and equipment. *Id.* at 238, 245. The *Wolman* Court also invalidated that portion of the statute authorizing state payment of field trip transportation costs for sectarian schools under the Establishment Clause. *Id.* at 253-54.

More than 25 years after the announcement of the *Lemon* test,

> a State may lend to parochial school children geography textbooks that contain maps of the United States, but the State may not lend maps of the United States for use in geography class. A State may lend textbooks on American colonial history, but it may not lend a film on George Washington, or a film projector to show it in history class. A State may lend classroom workbooks, but may not lend workbooks in which the parochial school children write, thus rendering them nonreusable. A State may pay for bus transportation to religious schools but may not pay for bus transportation from the parochial school to the public zoo or natural history museum for a field trip. A State may pay for diagnostic services conducted in the parochial school but therapeutic services must be given in a different building; speech and hearing "services" conducted by the State inside the sectarian school are forbidden, but the State may conduct speech and hearing diagnostic testing inside the sectarian school. Exceptional parochial school students may receive counseling, but it must take place outside of the parochial school, such as in a trailer parked down the street. A State may give cash to a parochial school to pay for the administration of state-written tests and state-ordered reporting services, but it may not

> provide funds for teacher-prepared tests on secular subjects. Religious instruction may not be given in public school, but the public school may release students during the day for religion classes elsewhere, and may enforce attendance at those classes with its truancy laws.

Wallace v. Jaffree, 472 U.S. at 111 (Rehnquist, J., dissenting) (citations and footnotes omitted).

One need look no further than the facts of this case to see the strange results the *Lemon* test has generated. The lower court held that any program that loans instructional materials, equipment, or supplies other than textbooks for the use of children in religiously affiliated schools violates the Establishment Clause. 151 F.3d at 374. It is difficult to see how maps, film projectors, lab equipment, computers, computer software, and library books might lead to the establishment of one national religion, while the loaning of textbooks presents no such danger. The contents of these educational materials are fixed and remain secular no matter where or by whom they are used or read. The Chapter 2 funds are used to purchase incontestably secular services and materials.

In contrast to this case, in *Walker v. San Francisco Unified School District*, 46 F.3d 1449, the Ninth Circuit upheld a Chapter 2 program that was almost identical to the one at issue here. The court rejected the argument that this Court's decisions create a rigid dichotomy between textbooks and other instructional materials. Instead, the Ninth Circuit found that benefits under the Chapter 2 program were "neutrally available without regard to religion," that the constraints under which Chapter 2 services are provided have adequate safeguards to prevent improper diversion to religious use, and that any "symbolic union between church and state" created by Chapter 2 is no greater than that in other cases where aid has been upheld by this Court. *Id.* at 1467-68.

Surveying the landscape of Establishment Clause jurisprudence, it becomes clear that the Court has engaged in an erratic application of the *Lemon* test resulting in a "books-for-kids versus materials-for-schools dichotomy." *Walker*, 46 F.3d at 1470 (Fernandez, C.J., concurring and dissenting). This discriminatory dichotomy undermines Congress' goal of improving educational opportunities for all schoolchildren--regardless of the public or private, religious or secular nature of their educational choices. Unless this dichotomy is dissolved, schoolchildren attending religiously affiliated schools are forever limited to the use of textbooks under the Chapter 2 program, whereas other schoolchildren are able to use up-to-date instructional materials. In order to end this discriminatory dichotomy, this Court should overrule *Lemon*, *Meek*, and *Wolman* and hold that so long as the government provides benefits in a neutral manner, the Establishment Clause is not offended.

B. This Court Has Created a Two-Tiered System of Establishment Clause Jurisprudence

The status of the *Lemon* test has been the subject of much speculation in recent years. Although the test has not received a formal eulogy from this Court, this Court has considered new approaches to cases involving the Establishment Clause. This Court has asked whether the governmental action is neutral toward religion, *Rosenberger*, 515 U.S. at 831, whether the government's action coerces anyone to support or participate in a religious exercise, *Lee v. Weisman*, 505 U.S. at 587, or whether the government's action could be viewed as an endorsement of a particular religious belief or message, *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573. The *Lemon* doctrine has

been highly criticized and infrequently used by this Court, yet, somehow it has managed to survive.[4]

Although *Lemon* has fallen out of favor with this Court, lower courts are required to apply it[5] only to have this Court review their decisions and apply a different analysis. The discordant results achieved by this split-level system can be seen by evaluating this Court's most recent Establishment Clause cases.

Zobrest v. Catalina Foothills School District, 509 U.S. 1, involved a challenge by a deaf student to a school district's refusal to provide him with a sign-language interpreter to translate in a parochial high school. The school district contended that the Establishment Clause prohibited it from providing the requested interpreter. The Ninth Circuit Court of

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[4] "Lemon, however frightening it might be to some, has not been overruled." *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 395 n.7 (1993). "I write separately only to note my disagreement with any suggestion that today's decision signals a departure from the principles described in *Lemon v. Kurtzman*." *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687, 710 (1994) (Blackmun, J., concurring). "Thus we do not accept the invitation of petitioners and *amicus* to reconsider our decision in *Lemon v. Kurtzman*." *Lee*, 505 U.S. at 587.

[5] In *Agostini v. Felton*, this Court reminded the lower courts:

> We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that "if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decision."

Agostini, 521 U.S. at 237.

Appeals applied the *Lemon* test and concluded that because the interpreter would have the primary effect of advancing religion, the placement of the interpreter in the parochial school would violate the Establishment Clause. *Zobrest*, 509 U.S. at 5 (citing *Zobrest*, 963 F.2d 1190 (9th Cir. 1992)). This Court reversed that finding because the interpreter was a neutral benefit available to all handicapped children in the school district, regardless of the sectarian or nonsectarian nature of the school; thus, the Establishment Clause was not violated.

> When the government offers a neutral service on the premises of a sectarian school as part of a general program that "is in no way skewed towards religion" it follows under our prior decisions that provision of that service does not offend the Establishment Clause.

Zobrest, 509 U.S. at 10 (quoting in part *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481, 488 (1986)).

This Court employed a similar analysis in *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687. There, taxpayers brought an action challenging the constitutionality of a New York statute that created a special school district for members of the Satmar Hasidim religion. The state trial court found that the statute failed all three prongs of the *Lemon* test and, therefore, violated the Establishment Clause. *Kiryas Joel*, 512 U.S. at 695 (citing *Grumet v. New York State Department of Education*, 579 N.Y.S.2d 1004 (1992)). The appellate division affirmed, finding that the statute had the primary effect of advancing religion, *id.* (citing 592 N.Y.S.2d 123 (1992)), and the state court of appeals agreed. *Id.* (citing 81 N.Y.2d 518, 601 N.Y.S.2d 61, 618 N.E.2d 94 (1993)).

This Court chose not to apply the *Lemon* test, but instead rested its decision on the fact that the statute in question

extended a governmental benefit in a nonneutral fashion. Although this Court ultimately agreed with the conclusions of the three lower courts, it did so by employing a different analysis.

> One aspect of the Court's opinion in these cases is worth noting: Like the opinions in two recent cases, *Lee v. Weisman; Zobrest v. Catalina Foothills School District*, and the case I think is most relevant to this one, *Larson v. Valente*, the Court's opinion does not focus on the Establishment Clause test we set forth in *Lemon v. Kurtzman*.

Kiryas Joel, 512 U.S. at 718 (O'Connor, J., concurring) (citations omitted).

The inefficiency of using one test throughout the lower courts, only to change the analysis when the case reaches the Nation's highest court was not lost on the dissenting Justices.

> [T]he Court's snub of *Lemon* today (it receives only two "see also" citations, in the course of the opinion's description of *Grendel's Den*) is particularly noteworthy because all three courts below (who are not free to ignore Supreme Court precedent at will) relied on it, and the parties (also bound by our case law) dedicated over 80 pages of briefing to the application and continued vitality of the *Lemon* test. In addition to other sound reasons for abandoning *Lemon*, it seems quite inefficient for this Court, which in reaching its decision relies heavily on the briefing of the parties and, to a lesser extent, the opinions of lower courts, to mislead lower courts and parties about the relevance of the *Lemon* test.

Id. at 750-51 (Scalia, J., dissenting).

A case decided during the 1994-95 term arrived at the Court in similar fashion. In *Rosenberger v. Rector and Visitors of the University of Virginia*, a student Christian newspaper filed suit against the University of Virginia claiming that the University's decision to deny student funds to it constituted impermissible viewpoint discrimination in violation of the First Amendment's Free Speech Clause. The University defended its denial of funding by claiming that allowing student funds to flow to a religious newspaper would violate the First Amendment's Establishment Clause. The court of appeals ruled for the University, finding that its discriminatory funding practices were justified by the "compelling interest in maintaining strict separation of church and state." *Rosenberger*, 515 U.S. at 828 (quoting *Rosenberger v. Rector and Visitors of University of Virginia*, 18 F.3d 269, 279-81 (4th Cir. 1994)). In making this determination, the lower court relied upon the three-part *Lemon* test and found that the funding of a religious newspaper would excessively entangle the University with the propagation of the Christian religion.

This Court, however, applied a dramatically different standard of review to detect a violation of the Establishment Clause. Instead of attempting to ascertain whether state and church had become impermissibly entangled, this Court simply assured itself that the governmental program was neutral toward religion.

> A central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion.

Id. at 839. Satisfied that the funding scheme was neutral toward religion, the Court concluded that funding of the Christian paper was not prohibited by the Establishment Clause. *Id.* at 840.

An example of this two-tiered standard arose recently in *Agostini v. Felton*, where petitioners sought to have this Court

reconsider its earlier decision in *Aguilar v Felton*, 473 U.S. 402 (1985). In *Aguilar*, this Court applied *Lemon*, *Meek*, and *Wolman* to bar New York City from sending public school teachers into parochial schools to provide remedial education for disadvantaged children under a congressionally mandated program. *Id.* at 404. This ruling forced school districts throughout the Nation to come up with creative ways to provide sorely needed educational assistance to children attending parochial schools. These solutions included the use of mobile instructional units or vans parked off the parochial school grounds and the use of computer-assisted instruction. *Agostini*, 521 U.S. at 213.

Frustrated with the exorbitant costs to maintain this program, New York, along with parents of parochial school students, brought a motion seeking relief from the permanent injunction. The Second Circuit Court of Appeals observed that the landscape of Establishment Clause jurisprudence had changed, but felt bound by the decision in *Aguilar*. *Id.* at 212. In *Agostini*, this Court announced a new modified *Lemon* test. Using this new standard, this Court held that the Establishment Clause no longer prohibits state programs from placing publicly employed teachers on the premises of parochial schools in order to provide remedial and supplemental secular education to disabled and disadvantaged children. *Id.* at 234-35.

In each of these cases the lower courts reviewed the Establishment Clause issue under the *Lemon* test, and in each of these cases this Court employed a different standard of review to determine whether that clause had been violated. Not only is this dual regime inefficient and confusing, it makes the level of constitutional protection vary depending on the procedural posture of each case. Recent decisions of this Court seem to suggest that the Court has abandoned the *Lemon* method of constitutional analysis; lower courts, however, do not enjoy this luxury. Until this Court expressly declares that *Lemon* is no longer the law, courts throughout the country will continue to

scrutinize fact patterns in search of secular purposes, primary effects, and excessive entanglements. Given that recent decisions of this Court suggest that more often than not rulings on the constitutionality of school aid programs will differ depending on which test is employed, school children throughout the country are facing the loss of important educational assistance merely because local courts are bound to a constitutional analysis which this Court no longer employs.

This Court should explicitly overrule *Lemon* and its progeny *Meek* and *Wolman* to end the current two-tiered system of Establishment Clause jurisprudence and to hold that so long as the government provides benefits in a neutral manner, the Establishment Clause is not offended merely because a religious institution might be one of the recipients of the benefit.

II

THE DISTRIBUTION OF A GENERAL GOVERNMENT BENEFIT IN A NEUTRAL FASHION DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE

When the government offers a neutral service that is not designed to help religion, the evil sought to be avoided by the Establishment Clause, the establishment of a national church, is simply not implicated. *Wallace v. Jaffree*, 472 U.S. at 106 (Rehnquist, J., dissenting). The First Amendment prohibits government from ***favoring*** religion, it does not, however, require government to ***discriminate*** against religion. "The Establishment Clause does not demand hostility to religion, religious ideas, religious people, or religious schools." *Kiryas Joel*, 512 U.S. at 717 (O'Connor, Jr., concurring). The neutrality test ensures that the government does not favor a particular religion, *id.* at 709; at the same time, the test does not force government to discriminate against religious institutions.

This Court has long recognized that the First Amendment requires the government to remain neutral toward religion.

> That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them.

Everson v. Board of Education, 330 U.S. at 18. More recently, the Court has reaffirmed the principle of neutrality in dealing with religion.

> [W]e have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit.

Zobrest, 509 U.S. at 8.

> But the principle [neutrality] is well grounded in our case law, as we have frequently relied explicitly on the general availability of any benefit provided religious groups or individuals in turning aside Establishment Clause challenges.

Kiryas Joel, 512 U.S. at 704.

Although this Court in *Agostini* was unwilling to express its abandonment of the *Lemon* test, it did change the general principles used to evaluate whether government aid violates the Establishment Clause. By modifying the three-part *Lemon* test, *Agostini* clarified the factors relevant to the analysis of a program's "primary effect" of advancing religion by considering all circumstances of the particular relationship.

> [The] three primary criteria [that] we currently use to evaluate whether government aid has the *effect* of advancing religion [are]: it does not result in governmental indoctrination; define its recipients by

> reference to religion; or create an excessive [government] entanglement.

Agostini, 521 U.S. at 234 (emphasis added). Had the lower court applied this test to the Chapter 2 program at issue here, it would have reached a different result.

First, Chapter 2 does not define its recipients by reference to religion. Chapter 2 is part of a general governmental program designed to distribute benefits equally to all schoolchildren, neither favoring nor discriminating against children attending parochial schools.

Second, the Chapter 2 program "does not result in governmental indoctrination" of religion. *Agostini*, 521 U.S. at 234. Unlike the programs at issue in *Agostini* and *Zobrest*, this program does not involve state-paid teachers or personnel. Thus, there is even less danger of governmental indoctrination than in those cases. Further, the statute ensures that any books, materials, or equipment purchased by public school authorities with Chapter 2 funds must be "secular, neutral and nonideological." 20 U.S.C. § 7372(a)(1).

Third, the Chapter 2 program plainly does not present any risk of "excessive entanglement." *Agostini*, 521 U.S. at 234. The annual monitoring visits by public school district employees, their screening activities, and the biennial visits by Louisiana monitors to religiously affiliated schools are less intrusive than the monthly on-site visits the Court held do not involve "excessive entanglement" in *Agostini*. 521 U.S. at 234.

Moreover, Chapter 2 benefits must only supplement, and may not supplant, funds from nonfederal sources. 20 U.S.C. § 7371(b). This ensures that aid will not "indirectly finance religious education" by "reliev[ing] the sectarian schools of costs they otherwise would have borne in educating their students." *Agostini*, 521 U.S. at 226 (citations and internal quotation marks omitted); *Zobrest*, 509 U.S. at 12. No funds

go to religious schools under Chapter 2. The funds go to state and local education agencies, which purchase the instructional materials and equipment and lend them to the individual schools. Title to the materials and equipment remains in the local education agency.

This Court now has an opportunity to evaluate Jefferson Parish's implementation of its Chapter 2 program under the principle of neutrality. Applying this principle to the facts of this case, it becomes clear that the state is acting in a neutral fashion in its dealings with parochial schools and that providing supplemental educational materials and equipment to students at parochial schools does not violate the Establishment Clause. Allowing Chapter 2 services to flow to parochial schools of different faiths does not treat any particular religion with favoritism, nor does it favor religious schools as a whole over public schools. It simply allows all eligible schoolchildren the opportunity to receive an important educational benefit.

CONCLUSION

This case provides the Court with an opportunity to overrule *Lemon*, *Meek*, and *Wolman* and reintroduce a degree of consistency to Establishment Clause jurisprudence. In recent decisions, this Court has rejected Establishment Clause claims challenging neutral governmental programs. However, by not explicitly overruling *Lemon*, this Court has condemned the lower courts to toil under the three-part *Lemon* test to scrutinize fact patterns in search of secular purposes, primary effects, and entanglements. This Court should expressly overturn *Lemon*, *Meek*, and *Wolman* to give full effect to Congress' goal of improving educational opportunities for all schoolchildren. Otherwise, schoolchildren attending religiously affiliated schools will be limited to the use of textbooks while other schoolchildren are able to use up-to-date sophisticated instructional materials. Nothing in the Establishment Clause prevents children who attend religiously affiliated schools from

participating in Chapter 2 services on an equal basis with all other schoolchildren. This Court should clarify, once and for all, that government programs that neutrally provide benefits to a large class of citizens do not offend the First Amendment simply because a religious institution might receive an indirect benefit.

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Respectfully submitted,

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